IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMERICAN PETROLEUM INSTITUTE, Plaintiff, v. KEN GIVENS, in his official capacity as Commissioner of Agriculture of the State of Tennessee, Defendant.	Civil Action No. __________ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiff American Petroleum Institute ("API") brings this action seeking declaratory and injunctive relief to prohibit the enforcement of the Tennessee Renewable Fuels Blending Act of 2009, Tenn. Code Ann. § 47-25-2001 *et seq.* The Tennessee Renewable Fuels Blending Act, which goes into effect on January 1, 2010, imposes obligations on API's members that conflict with federal law and violate the Commerce Clause of the U.S. Constitution. Through this action, API seeks to protect the federal statutory and constitutional rights of its members by preventing Defendant Ken Givens, in his official capacity as Commissioner of Agriculture of the State of Tennessee, from enforcing the provisions of the Tennessee statute.

2. The Tennessee Renewable Fuels Blending Act requires refiners and suppliers to sell gasoline "that has not been blended with, but is suitable for blending with ethanol," and to sell diesel "that is suitable for blending with biodiesel." *Id.* § 47-25-2003.

The Tennessee law also declares void any contractual provision that "forbids, limits or restricts a wholesaler's ability to blend petroleum products with ethanol or biodiesel." *Id.* § 47-25-2004. The Commissioner of Agriculture is authorized to assess fines of up to $5,000 per day for violations of the statute.

3. By forcing refiners and suppliers to sell only unblended gasoline to wholesalers in Tennessee, at each wholesaler's sole discretion, the Tennessee Renewable Fuels Blending Act conflicts with federal law and therefore is preempted. The Tennessee law is preempted by three federal laws: (1) the federal renewable fuel standard ("RFS") program, (2) the Lanham Act, and (3) the Petroleum Marketing Practices Act.

4. *Federal RFS program.* The RFS program was established by the Environmental Protection Agency ("EPA") under authority granted by the Energy Policy Act of 2005 ("EPACT"), Pub. L. No. 109-58, 119 Stat. 594, and amended by the Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat. 1492. Because the Tennessee law interferes with these federal laws and regulations that require refiners to assure production of biofuels by giving refiners the choice of whether and how to blend gasoline and diesel with renewable fuels, the Tennessee law conflicts with federal law and is therefore preempted.

5. *Lanham Act.* The Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, grants trademark holders the right to exclude others from using their trademark. The Tennessee law prevents a refiner from choosing to be the sole producer of the products sold under its trademark. Instead, the state law requires a refiner to permit a wholesaler to produce the renewable fuel products sold under the refiner's trademark. Because the Tennessee law interferes with the federal rights of trademark holders, it conflicts with the Lanham Act and is therefore preempted.

6. *Petroleum Marketing Practices Act.* The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 *et seq.*, contains an express preemption provision

that invalidates any state law narrowing the grounds for termination or non-renewal of a petroleum marketing franchise agreement. The PMPA permits a refiner to terminate or non-renew a franchise agreement if a distributor engages in unauthorized blending of the refiner's product. Under the Tennessee law, however, a wholesaler cannot be terminated for unauthorized blending because the Tennessee Renewable Fuels Blending Act forces refiners to permit blending. Because the Tennessee law removes unauthorized blending as a ground for terminating or non-renewing a franchise agreement, it is preempted by the PMPA.

7. The Tennessee Renewable Fuels Blending Act is also unenforceable because it violates the Commerce Clause of the U.S. Constitution. The Tennessee law discriminates against, and impermissibly burdens, interstate commerce by favoring local distributors and retailers at the expense of out-of-state refiners. Although federal law imposes substantial renewable fuel obligations on refiners, it also provides an incentive to blend renewable fuels by offering a tax credit for each gallon of renewable fuel that is blended. A refiner can therefore offset, to some degree, the burden imposed by the RFS program by taking advantage of the tax credits available for blending renewable fuels. The Tennessee law, however, permits a distributor—by purchasing unblended gasoline and blending itself—to deprive a refiner of the opportunity to earn the tax credit and to claim the tax credit for itself, even though the distributor has no obligation to blend under federal law.

JURISDICTION AND VENUE

8. This declaratory judgment action is brought under the Supremacy and Commerce Clauses of the United States Constitution and 42 U.S.C. § 1983. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States. This Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 & 2202.

9. Venue in this district is proper under 28 U.S.C. § 1391(b)(1) & (2) because Defendant resides in this district, and the events and omissions giving rise to this case occurred in this district.

PARTIES

10. Plaintiff API is a national trade association that represents all aspects of America's oil and natural gas industry. API's approximately 400 corporate members, ranging from the largest major oil company to the smallest independents, represent all segments of the industry. API's members include producers, refiners, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API advocates on behalf of the petroleum industry to the public, Congress and the Executive Branch, state governments and the media. API also negotiates with regulatory agencies, represents the industry in legal proceedings, participates in coalitions and works in partnership with other associations to achieve its members' public policy goals. In this regard, API regularly appears in litigation as a party where the issues raised are of widespread importance and concern to the industry. API has standing to bring this suit on behalf of its members because its members would have standing to sue in their own right, it seeks to protect interests germane to API's purpose, and neither the claims asserted nor the relief requested require the participation of API's members. On behalf of its members, API has challenged ethanol blending laws enacted by the states of North Carolina and South Carolina. *See Am. Petroleum Inst. v. Cooper*, No. 08-396 (E.D.N.C. filed Aug. 18, 2008); *Am. Petroleum Inst. v. South Carolina Dep't of Revenue*, No. 2008-95-486, 2009 WL 1203322 (S.C. May 4, 2009).

11. Defendant Ken Givens is the Commissioner of Agriculture of the State of Tennessee. He is the state official charged with enforcing the Tennessee Renewable Fuels Blending Act. The Tennessee Renewable Fuels Blending Act authorizes the Commissioner

of Agriculture to investigate refiners and suppliers for noncompliance with the statute, and to impose fines of up to $5,000 per day for each day of willful noncompliance.

BACKGROUND

A. Production and Distribution of Gasoline and Diesel

12. Nearly 40 percent of the energy consumed worldwide is supplied by petroleum products. These products, including gasoline, diesel fuel, and jet fuel, are sources of fuel for motor vehicles, aircraft, trains, and other forms of transportation.

13. Petroleum products are derived from crude oil. After crude oil is removed from the ground, it is transported to an oil refinery. The refinery uses a distillation process to separate the crude oil into its component parts: gasoline, diesel fuel, and other petroleum products. Once the products are separated, many refineries use processes known as "cracking" and "reforming" to generate additional gallons of gasoline from lower-valued petroleum products. Before leaving the refinery, the gasoline is blended to ensure that it has the desired vapor pressure and octane. The gasoline is also treated to remove impurities such as sulfur.

14. Many petroleum products—including gasoline and diesel fuel—leave the refinery via a network of underground pipelines. Each refinery has a "transmission" pipeline, which connects to one of the nation's major pipelines. A series of pump stations along the pipeline help keep the liquid product under pressure and moving forward. From a centralized control center, pipeline operators can regulate valves and pump stations along the pipeline to keep batches of product moving through the pipeline on schedule.

15. The petroleum products travel by pipeline until they eventually reach distribution centers, often referred to as "terminals." Terminals feature large-capacity storage tanks for the products moving through the pipeline. As product flows into the terminal, samples are removed and tested to ensure that products meet specifications and are

directed to the right storage tank. The tests also identify where one product ends and another begins—an essential feature because multiple products travel through the line one after the other.

16. Most gasoline and diesel fuel travel from the terminal to the retail service station by tanker truck. Most tankers have three or four separate compartments so, at the terminal, lines from several storage tanks come together at a single loading "rack." This process allows the driver to fill each tank compartment with different products—for example, multiple grades of gasoline and diesel fuel—without moving the truck. The tanker truck delivers the gasoline and diesel fuel to the retail stations where it is stored in underground tanks until it is pumped into a vehicle.

B. Distribution of Biofuels

17. Renewable fuels, or "biofuels," are transportation fuels produced from organic material derived from plants and animals. Ethanol, the most common biofuel, is primarily derived from corn but can also be produced from other feedstocks such as sugarcane. The second most common biofuel, biodiesel, is produced from vegetable and animal oils (usually soybean oil), as well as recycled cooking grease.

18. Biofuels are commonly blended with petroleum products for use as transportation fuel. In 2008, 9.6 billion gallons of ethanol were blended into gasoline sold in the United States. For January to September 2009, more than 80 percent of gasoline sold in the U.S. is estimated to have included ethanol. The most common product, known as "E10," consists, based on volume, of 10 percent ethanol and 90 percent gasoline. E10 is sold at many retail service stations and can be used to fuel most automobiles. Another product, E85, nominally consists of 85 percent ethanol (by volume) combined with gasoline or other hydrocarbons. Although this product cannot be used in standard automobiles, some automobile manufacturers sell "flex fuel vehicles" that can use E85. Similarly, biodiesel is now commonly blended with diesel fuel for use in diesel engines. Available blends in

current use typically range from B2 (consisting, by volume, of 2 percent biodiesel and 98 percent petroleum diesel) to B20 (consisting, by volume, of 20 percent biodiesel and 80 percent petroleum diesel).

19. Use of ethanol and other biofuels as transportation fuels presents special challenges. One of the more significant challenges is transporting ethanol through the country's pipeline system. Ethanol, unlike gasoline, has a strong affinity to absorb or pick up water. Because water accumulation in pipelines is a normal occurrence, introducing ethanol into a pipeline risks rendering it unusable as a transportation fuel. In addition, ethanol can dissolve and carry impurities that are present inside multi-product pipeline systems, making it harmful to motor vehicle engines when blended into gasoline. There is also some evidence that ethanol in high concentrations can lead to stress corrosion cracking of the pipeline, which is difficult to detect and manage. There is ongoing research regarding stress corrosion cracking in order to allow ethanol to be stored in tanks and transported by pipeline.

20. For these reasons, ethanol is usually shipped to terminals separately, most often by barge, rail or truck. Ethanol is then added to the gasoline either by "in-line" blending or "splash" blending.

21. In-line blending is accomplished in a single step. The driver connects the tanker truck to the loading rack at the terminal, and a computer calculates how much ethanol must be blended with the gasoline. The fuel is blended in the piping system before it gets to the tank truck compartment. When in-line blending is used, the driver simply connects and disconnects from the terminal rack once and a computer ensures that the ethanol is blended correctly.

22. In contrast, splash blending requires a two-step process. The driver must connect, load, and disconnect at the gasoline loading rack, then drive to a separate area in the terminal or to another location where the tank truck is again connected, loaded, and disconnected from the ethanol loading system. Splash blending requires the truck driver to

properly read the invoice showing the amount of gasoline purchased at a terminal, perform the right calculation, and then add the right amount of ethanol to the proper compartment of the tank truck.

C. Distribution and Marketing of "Branded" Transportation Fuels

23. Gasoline is sold at over 160,000 retail stations in the United States. Approximately 40 percent of these stations sell "branded" gasoline, while the remaining 60 percent sell "unbranded" gasoline. Branded gasoline is gasoline sold under a refiner's trademark. It differs from unbranded gasoline based on additives added to the gasoline by the refiner. Each major oil company typically adds its own proprietary additives to its gasoline in order to provide or enhance specific performance features. Each company also provides the technical expertise to back its brand. Many customers buy branded gasoline because of this consistent quality.

24. Although many retail stations sell branded gasoline, refiners own and/or operate only a small percentage of these stations. Most of the stations are independently owned by distributors or retailers; these distributors and retailers use the refiner's trademarks to sell branded gasoline by written agreement with the refiner. Moreover, the branded gasoline is typically delivered to these independently owned stations by independent distributors—also referred to as "jobbers," "marketers," or "wholesalers"—and not by the refiner. These branded distributors also use the refiner's trademarks in distributing branded gasoline by written agreement with the refiner. As discussed below, the franchise agreements between a refiner and distributor, a refiner and retailer, or a distributor and retailer for marketing branded gasoline are governed by the federal Petroleum Marketing Practices Act.

25. Franchise agreements governing the marketing of branded gasoline contain provisions to protect the rights of the refiner as trademark holder. These agreements typically forbid a distributor or retailer from adding anything or otherwise adulterating the

refiner's product. Franchise agreements frequently forbid blending the gasoline with ethanol or other biofuels, which is considered a type of product adulteration. When a refiner chooses to permit a distributor to splash blend the refiner's branded gasoline, the parties typically sign an addendum to the franchise agreement that establishes the conditions under which the blending can occur. In this addendum, the distributor is typically provided detailed guidelines and procedures regarding splash blending and handling of ethanol-blended fuels in an effort to minimize the risk of improper splash-blending of fuel ultimately sold as branded gasoline. Franchise agreements typically contain a clause allowing the refiner the ability to revoke the permission if they provide a certain amount of lead time, such as 30 days.

FEDERAL REGULATION OF BIOFUELS

26. As part of the EPACT legislation in 2005, Congress sought to increase the quantity of renewable fuels, including ethanol and biodiesel, used in motor fuels in the United States. The statute established minimum biofuel requirements and directed the EPA to promulgate regulations to ensure that these requirements were met. *See* 42 U.S.C. § 7545(o)(2)(A)(iii).

27. On May 1, 2007, the EPA promulgated regulations as required by EPACT. The regulations set out the requirements of the federal RFS program (40 C.F.R. § 80.1105; 40 C.F.R. § 80.1106), specify fuel refiners and importers' obligations under the program (40 C.F.R. § 80.1107), establish a credit trading program (40 C.F.R. § 80.1128), and set a daily monetary penalty that the EPA will impose on a refiner or importer that does not meet its renewable fuel obligation (40 C.F.R. §§ 80.1160–80.1161; 40 C.F.R. § 80.1163).

28. The RFS program requires the EPA Administrator to determine annually an RFS percentage for the upcoming year. The RFS percentage is calculated by dividing the amount of renewable fuel required to be blended for a given year by the amount of gasoline expected to be used during that year, including certain adjustments specified by

EPACT. Based on this percentage, obligated parties—refiners and blenders, but not wholesalers—must determine their renewable volume obligation ("RVO").

29. To demonstrate compliance with the RFS program, obligated parties must acquire renewable fuel credits called Renewable Identification Numbers ("RINs"). A RIN is a unique number generated to represent a volume of renewable fuel. The RIN tracking system allows EPA to monitor whether an obligated party has met its RVO. If a party fails to obtain an adequate number of RINs, that company is subject to a $32,500 penalty per day. An obligated party can obtain RINs by either purchasing renewable fuels with RINs attached (and then blending the renewable fuels itself) or by purchasing RINs from another party that has purchased and blended the ethanol and made the RINs available for sale.

30. In December 2007, a few months after the RFS program began, Congress revised and expanded the program as part of the Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat. 1492. EISA substantially increases the minimum biofuel requirements. EISA also instructs EPA to revise the RFS regulations to replace the single renewable fuel mandate with four separate biofuel mandates. In addition to a total renewable fuel mandate as under EPACT, obligated parties must also blend specified volumes of biomass-based diesel, advanced biofuel, and cellulosic biofuel. EISA's biofuel mandates are set forth below.

EISA Renewable Fuel Standards Mandate (*in billions of gallons*)

Year	Total Renewable Fuel	Biomass-Based Diesel	Advanced Biofuel	Cellulosic Biofuel
2008	9.0			
2009	11.1	0.5	0.6	
2010	12.95	0.65	0.95	0.1
2011	13.95	0.8	1.35	0.25
2012	15.2	1.0	2.0	0.5
2013	16.55	a	2.75	1.0
2014	18.15	a	3.75	1.75
2015	20.5	a	5.5	3.0
2016	22.25	a	7.25	4.25

2017	24.0	a	9.0	5.5
2018	26.0	a	11.0	7.0
2019	28.0	a	13.0	8.5
2020	30.0	a	15.0	10.5
2021	33.0	a	18.0	13.5
2022	36.0	a	21.0	16.0
2023	b	b	b	b

[a] To be determined by EPA, but not less than 1.0 billion gallons.
[b] To be determined by EPA.

31. In May 2009, EPA issued a Notice of Proposed Rulemaking proposing changes to the RFS program as mandated by EISA. Although these proposed regulations (known as the "RFS2 regulations") have not yet been finalized, EPA has begun using the total renewable fuel mandate established by EISA to set the RFS mandate. Because this mandate is significantly greater than the volume set by EPACT, obligated parties are required to obtain substantial volumes of RINs even before the RFS2 regulations take effect. For example, in 2009, the RFS was 10.21 percent, which was intended to lead to the use of 11.1 billion gallons of renewable fuels.

32. In addition to the RFS program, Congress has enacted the Volumetric Ethanol Excise Tax Credit, which makes entities that blend gasoline and ethanol eligible for federal tax credits. In 2009, an ethanol blender is eligible for a 45 cent tax credit for every gallon of ethanol that it blends. 26 U.S.C. § 6426(b)(2)(A), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651. Because blenders typically blend ethanol at a rate of 10 percent to create a product known as "E10," the tax credit amounts to 4.5 cents per gallon of gasoline that is created. In subsequent years, a blender is eligible for either a 45 or 51 cent tax credit per gallon of ethanol (4.5 or 5.1 cents per gallon of E10), depending on the amount of ethanol imported and produced in the previous year. *Id.* § 6426(b)(2)(C).

33. Likewise, Congress has enacted the Biodiesel Mixture Excise Tax Credit, which makes entities that blend biodiesel and petroleum diesel eligible for a $1.00 per

gallon federal tax credit. 26 U.S.C. § 6426(c)(3), as amended by the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765. For instance, if a supplier blends 20 percent biodiesel, by volume, into petroleum diesel to create a product known as "B20," that entity would be eligible for a federal tax credit of 20 cents for each gallon of the resultant blend.

34. Many of API's members must comply with the biofuel mandates created by the RFS program because they are refiners that produce gasoline in the 48 contiguous states, importers that import gasoline into the 48 contiguous states, or both. *See* 40 C.F.R. § 80.1106(a)(1). In contrast, upon information and belief, the wholesalers entitled to purchase unblended gasoline under the Tennessee Renewable Fuels Blending Act do not have to meet the RFS mandates. *Id.* ("A party that simply adds renewable fuel to gasoline . . . is not an obligated party.").

TENNESSEE RENEWABLE FUELS BLENDING ACT OF 2009

35. The Tennessee Renewable Fuels Blending Act requires refiners and suppliers to offer unblended gasoline and diesel for sale to wholesalers:

> All refiners, suppliers and permissive suppliers in this state shall make available to a wholesaler gasoline or gasoline blending stock that has not been blended with, but is suitable for blending with, ethanol. All refiners, suppliers and permissive suppliers in this state shall make available to a wholesaler diesel that is suitable for blending with biodiesel. Diesel sold by refiners, suppliers and permissive suppliers to wholesalers may contain up to five percent biodiesel.

Tenn. Code Ann. § 47-25-2003.

36. The statute also prevents a refiner from entering into, or renewing, contracts with wholesalers that restrict the wholesalers' ability to use ethanol or biodiesel:

> Any contract or provision between a wholesaler and a refiner, supplier, or permissive supplier executed or renewed on or after the effective date of this act, which forbids, limits or restricts a

> wholesaler's ability to blend petroleum products with ethanol or biodiesel, shall be void as against public policy.

Id. § 47-25-2004.

37. The Tennessee Renewable Fuels Blending Act becomes effective on January 1, 2010. Section 3, S. Bill No. 1931.

38. API's members include "refiners," "suppliers," and "permissive suppliers" that sell gasoline or diesel in Tennessee and therefore are subject to the requirements of the Tennessee Renewable Fuels Blending Act. *Id.* § 47-25-2002.

THE TENNESSEE RENEWABLE FUELS BLENDING ACT'S INTERFERENCE WITH FEDERAL LAW

39. The Tennessee Renewable Fuels Blending Act directly interferes with at least three federal laws: (1) the RFS program; (2) the Lanham Act; and (3) the PMPA.

A. Interference with the Federal RFS Program.

40. The Tennessee Renewable Fuels Blending Act conflicts with the federal RFS program because it interferes with Congress's objectives and with the methods chosen by Congress to achieve those objectives.

1. Interference with Congress's Objectives.

41. Congress enacted the RFS program to increase the use of biofuels. To achieve this goal, Congress mandated that refiners blend a specified minimum amount of renewable fuels into the gasoline that they sell. The amount that must be blended pursuant to federal law increases annually to ensure that use of biofuels continues to increase. Despite Congress's goal of increasing biofuel usage, the Tennessee Renewable Fuels Blending Act mandates that refiners sell unblended gasoline whenever it is demanded by wholesalers.

42. Neither federal nor Tennessee law requires wholesalers to blend biofuels into gasoline. As a result, the Tennessee Renewable Fuels Blending Act conflicts

with federal law by preventing entities with a federal obligation to blend renewable fuels from doing so, and by requiring them to sell unblended fuel to entities that are not required by federal or state law to use renewable fuels.

2. Interference with Congress's Methods for Achieving Its Goals.

43. Congress has established aggressive targets for biofuel usage, and in so doing it has given refiners considerable flexibility to decide how to meet those targets. Specifically, Congress mandated the creation of a credit trading program that allows refiners to purchase biofuel credits as an alternative to increasing their own biofuel usage. *See* 42 U.S.C. § 7545(o)(2)(A)(iii). This credit trading program gives refiners the option of blending renewable fuels themselves or relying on other entities to carry out the required blending.

44. The Tennessee Renewable Fuels Blending Act destroys the flexibility that Congress provided to refiners. By giving wholesalers control over the decision to buy a blended or unblended product, the Tennessee law takes away a refiner's option under federal law to meet its federal obligation by blending renewable fuel itself. Instead, the refiner must participate in the credit trading program to acquire the RINs that it could not generate itself by blending.

45. The flexibility inherent in the RFS program allows refiners to choose the most efficient way to meet the demanding targets set by federal law. As explained above, federal law allows refiners to offer only unblended gasoline, only blended gasoline, or a combination of blended and unblended products. By requiring refiners to offer unblended gasoline, the Tennessee Renewable Fuels Blending Act deprives refiners of the ability to comply with the federal renewable fuels mandates by offering only blended gasoline and eliminates their ability to choose which combination of blended and unblended products to sell. The Tennessee law thus prevents refiners from meeting their federal biofuel obligations as efficiently as possible.

46. By impairing the flexibility of the federal RFS program, the Tennessee Renewable Fuels Blending Act makes it impossible for refiners to determine accurately the demand for their products. Before the Tennessee Renewable Fuels Blending Act was enacted, a refiner could determine by contract how much blended and how much unblended gasoline it would sell to wholesalers. Under the Tennessee Renewable Fuels Blending Act, a refiner has no way to know how much unblended and how much blended gasoline will be sold at a given terminal in any given week.

47. The uncertainty in the demand for blended and unblended products interferes with Congress's goals in two ways. First, as a result of its inability to predict demand, a refiner will have to ship and store enough biofuels to sell blended gasoline if the wholesalers prefer to purchase blended products. If some wholesalers purchase unblended gasoline, the refiner will be left with an excess supply of biofuels. This inefficient outcome would not occur in the absence of the Tennessee Renewable Fuels Blending Act because refiners can determine, based on their contracts with wholesalers, exactly how much blended gasoline they need to produce. Increasing the amount of stored biofuels will impose additional costs, including additional storage, delivery vehicles, and inventory carrying costs.

48. Second, the uncertainty in demand creates an obstacle to achieving the benefits of switching from splash blending to in-line blending. Although splash blending is currently the most common method for blending in Tennessee, it is generally considered a transitional method to meet the immediate demand for blended gasoline. Many refiners are in the process of installing in-line blending equipment at their terminals. With in-line blending, the ratio of ethanol to gasoline is controlled by computer, which ensures that the resulting product is well-mixed and reduces the risk of error. The Tennessee Renewable Fuels Blending Act prevents a refiner that has installed in-line blending from maximizing the benefits of this equipment by, for example, selling only blended gasoline from its terminal.

49. Conversion to in-line blending requires a substantial investment. Refiners will be discouraged from investing in this equipment, despite the efficiency gains that are possible, because the statute prevents them from determining the demand for their blended products. Because the Tennessee Renewable Fuels Blending Act leaves the choice between blended and unblended fuel entirely to wholesalers and because it invalidates future contractual agreements between refiners and wholesalers that restrict a wholesaler's ability to blend, refiners cannot accurately predict how much blended and how much unblended gasoline they will sell. The Tennessee Renewable Fuels Blending Act therefore interferes with the federal goal of efficient use of renewable fuels because it presents a serious obstacle to the installation of in-line blending equipment.

50. Because of the way that the RFS program is designed, the interference with federal requirements caused by the Tennessee Renewable Fuels Blending Act will increase annually. The federal renewable fuels mandates increase substantially from year to year, and thus refiners are obligated to use more renewable fuel each year. In 2008, refiners were required to blend 9 billion gallons of biofuels. That amount more than doubles to 18.15 billion by 2014, and doubles again to 36 billion by 2022. As the federal obligation increases, the interference caused by the Tennessee Renewable Fuels Blending Act also increases.

51. As the federal obligations increase, refiners may not be able to purchase enough credits to satisfy their obligations for a number of reasons. First, as noted above, wholesalers have no obligation under federal or state law to add biofuels to unblended gasoline. If a distributor purchases unblended gasoline and does not blend it with biofuel, there will be no credits to purchase. Second, even if the gasoline is blended with biofuels, some wholesalers, particularly smaller wholesalers, may decide that entering the credit trading system is not worth the effort. If so, once again there will be no credits available for purchase. Third, even if credits are generated, wholesalers are not required to sell them. Fourth, if wholesalers sell the credits, they are free to sell them to whomever they choose,

and a refiner cannot ensure that it will be able to purchase as many credits as it needs. Thus, for a variety of reasons, the Tennessee Renewable Fuels Blending Act creates a situation in which refiners may be prevented from blending gasoline with biofuels themselves and may also be unable to purchase sufficient credits to meet their federal obligations.

52. The Tennessee Renewable Fuels Blending Act's interference with the federal RFS program also increases the likelihood that a refiner's products do not comply with all applicable federal requirements. Federal law imposes strict requirements that can be met only if gasoline is properly blended. To ensure that these requirements are met, some refiners choose to blend the gasoline themselves, instead of permitting wholesalers to do it. By retaining control of the blending process, a refiner can better ensure that gasoline sold under its trademark complies with federal law.

53. To reduce gasoline emissions, federal law limits the vapor pressure of gasoline by setting maximum permissible Reid Vapor Pressure ("RVP") standards. Because ethanol increases the gasoline's vapor pressure, the RVP of gasoline containing 10 percent ethanol (E10) typically exceeds the amount permitted by federal law. To account for this increase in RVP, federal regulations provide for a "one-pound waiver," under which ethanol-blended gasoline satisfies the RVP requirement so long as it exceeds the otherwise-applicable requirement by no more than one pound per square inch. 40 C.F.R. § 80.27(d)(1). To qualify for the one-pound waiver, the gasoline must contain between 9 and 10 percent ethanol (E9 or E10). *Id.* § 80.27(d)(2).

54. By requiring refiners to sell unblended gasoline, the Tennessee Renewable Fuels Blending Act interferes with refiners' ability to ensure that their products comply with the RVP requirements. If a wholesaler adds too much ethanol to gasoline, the blended gasoline does not qualify for the one-pound waiver provision, and the gasoline will fail to meet the federal RVP requirement. In addition, gasoline that contains more than 10 percent ethanol (e.g. E11) violates federal law because it is not substantially similar to a fuel

that is already in use. *See* 42 U.S.C. § 7545(f). Similarly, if the wholesaler fails to blend enough ethanol (for example, only enough to produce E8 or E9), the blended gasoline does not qualify for the one-pound waiver provision, and the gasoline will fail to meet the federal RVP requirement.

55. Even if wholesalers add the correct amount of ethanol to gasoline, refiners forced to sell unblended gasoline under the Tennessee Renewable Fuels Blending Act will still face the threat that the product will not meet federal requirements if a wholesaler commingles E10 and unblended gasoline. A wholesaler is not required to add ethanol to unblended gasoline, and for a variety of reasons it may choose not to do so. If a wholesaler delivers unblended gasoline to a retail station one week and ethanol-blended gasoline the following week, and the gasoline is mixed together in the station's underground storage tanks, the resulting product may not contain sufficient ethanol to qualify for the one-pound RVP waiver, and thus will likely violate the federal RVP requirement.

56. Many refiners blend the gasoline themselves, instead of permitting wholesalers to do it, because refiners can be held liable under federal law for wholesalers' blending errors. *See* 40 C.F.R. § 80.28. Although the Tennessee Renewable Fuels Blending Act states that refiners are not liable under Tennessee law for improper blending by wholesalers, Tenn. Code Ann. § 47-25-2006, the state law does not, and could not, exempt refiners from liability under federal law.

B. Interference with Federal Trademark Law.

57. The Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, gives trademark holders the exclusive right to use their trademarks in connection with the sale, offering for sale, distribution, and advertising of their goods or services. The Lanham Act also gives trademark owners the right to license third parties to use their marks, but it does not compel them to do so. Instead, a trademark holder has the right to choose to be the sole producer of the goods or services sold under its trademark.

58. A significant amount of the gasoline sold by retail stations in Tennessee is sold under the trademarked brand names of refiners. Consumers rely on those trademarks to indicate the origin of the gasoline they purchase, and as a way of identifying gasoline that meets their expectations of quality and consistency. A trademark owner has not only a right but also an obligation and duty to protect its trademark. The ability to control which products bear the refiner's trademark is critically important to ensuring that gasoline sold under the refiner's trademarks is of consistent quality.

59. Refiners have a right under the Lanham Act to ensure the quality of the products sold under their trademarks in Tennessee by choosing to be the sole producer of those products. Thus, a refiner is entitled under federal law to decide that it, and not a wholesaler, will blend biofuels into the gasoline sold under its trademark. By giving wholesalers the right to purchase unblended gasoline and blend it with biofuels not purchased from, or manufactured by, the refiner, the Tennessee Renewable Fuels Blending Act prevents refiners from exercising this federally protected right.

C. Interference with the Federal Petroleum Marketing Practices Act.

60. The Tennessee Renewable Fuels Blending Act interferes with Congress's objectives in enacting the PMPA, which creates federal standards to govern the termination and non-renewal of franchise agreements between refiners and distributors. To promote Congress's goals, the PMPA contains a preemption provision that expressly preempts any state law relating to termination or non-renewal. 15 U.S.C. § 2806(a)(1). Under this provision, a state law is preempted if it prevents a refiner from terminating or non-renewing a franchisee on grounds permitted by the PMPA. As relevant here, the PMPA expressly permits termination or non-renewal of a franchisee for "willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee." *Id.* § 2802(c)(10).

61. The Tennessee Renewable Fuels Blending Act prevents a refiner from terminating or non-renewing a distributor based on the distributor's blending of biofuels without the refiner's consent, which would otherwise be a permissible ground for termination or non-renewal under the PMPA. Refiners can, and often do, treat unauthorized blending as willful adulteration in violation of the PMPA, and thus terminate or non-renew the franchise agreement on that ground. Because the Tennessee Renewable Fuels Blending Act prevents refiners from prohibiting blending, refiners will no longer be able to terminate a franchise relationship on the ground that a distributor was blending ethanol without the refiner's permission. As a result, the Tennessee law impermissibly narrows the grounds on which a franchise agreement may be terminated or non-renewed under the PMPA.

THE TENNESSEE RENEWABLE FUELS BLENDING ACT'S DISCRIMINATION AGAINST INTERSTATE COMMERCE

62. The Tennessee Renewable Fuels Blending Act discriminates against interstate commerce by favoring wholesalers over refiners. The Tennessee law provides wholesalers—who, upon information and belief, are overwhelmingly in-state companies—with considerable benefits. For example, wholesalers can decide whether they want to blend refiners' gasoline in order to generate RINs that they can sell and to claim the accompanying federal tax credit. Tennessee law provides wholesalers with these benefits even though they bear none of the burdens imposed by federal or state law. On the other hand, Tennessee law forces refiners, suppliers, and permissive suppliers—who, upon information and belief, are overwhelmingly out-of-state companies—to sell unblended gasoline to wholesalers, despite their obligation under federal law to blend vast amounts of biofuels, even if they can blend the gasoline themselves more efficiently. There is no justification beyond economic protectionism for favoring in-state wholesalers in this manner.

63. The Tennessee Renewable Fuels Blending Act also discriminates against interstate commerce by imposing a burden on interstate commerce that is clearly

excessive in relation to any local benefits. Other than economic protectionism, there is no local benefit for imposing this burden. In contrast, the statute imposes a substantial burden on refiners and suppliers. These entities are required by the Tennessee Renewable Fuels Blending Act to sell unblended gasoline, despite their obligation under federal law to blend vast amounts of biofuels. As a result of the Tennessee law, refiners can no longer predict accurately the demand for unblended and blended gasoline, and thus will need to store sufficient volumes of unblended gasoline and biofuels to meet the uncertain demand for these products. Some refiners may even have to offer an additional product for sale at their terminals to comply with the Tennessee Renewable Fuels Blending Act. The statute therefore imposes a substantial burden on interstate commerce, which is clearly excessive in light of the lack of legitimate local benefit.

CLAIMS FOR RELIEF

Count I – Declaratory and Injunctive Relief: EPACT and EISA Preemption of the Tennessee Renewable Fuels Blending Act

64. API incorporates and realleges each and every allegation contained in paragraphs 1 to 63 of this Complaint as though fully set forth herein.

65. The Supremacy Clause of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Under the Supremacy Clause, when state and federal laws conflict, federal law prevails. To implement the Supremacy Clause, courts conduct a preemption analysis to determine whether a conflict exists. The Supreme Court has long held that a state law is preempted where, as here, it stands as an obstacle to the accomplishment of Congress's purposes and objectives.

66. The Tennessee Renewable Fuels Blending Act stands as an obstacle to the accomplishment of the purposes and objectives of Congress. The state statute conflicts with, and imposes obstacles to achieving the federal objectives of, the RFS program by interfering with Congress's objective to increase biofuels usage, and by interfering with the flexible method Congress chose to increase renewable fuel usage. By interfering with Congress's choices, the Tennessee law impairs the flexibility inherent in the federal program and prevents refiners from selecting the most efficient method to meet their federal blending obligations. As a result, the Tennessee law may prevent refiners from meeting their federal obligations and from ensuring that their gasoline meets federal requirements.

67. Because the Tennessee Renewable Fuels Blending Act stands as an obstacle to the accomplishment of Congress's objectives, it is preempted by the Energy Policy Act of 2005, the Energy Independence and Security Act of 2007, and their implementing regulations.

Count II – Declaratory and Injunctive Relief:
Lanham Act Preemption of the Tennessee Renewable Fuels Blending Act

68. API incorporates and realleges each and every allegation contained in paragraphs 1 to 67 of this Complaint as though fully set forth herein.

69. The Lanham Act gives trademark holders the exclusive right to use trademarks in connection with the sale, offering for sale, distribution, and advertising of goods or services bearing the trademark, and to license third parties to use trademarks in connection with the sale, offering for sale, distribution, and advertising of goods or services bearing the trademark. 15 U.S.C. §§ 1114, 1125.

70. The Tennessee Renewable Fuels Blending Act conflicts with the Lanham Act because it interferes with refiners' rights as trademark holders. The Lanham Act gives refiners the right to exclude others from producing the blended gasoline sold under their trademarks, but the Tennessee law prevents refiners from exercising this right by

requiring refiners to sell unblended gasoline, a raw ingredient in the production of blended gasoline, to distributors, who then can blend it with biofuels not purchased from, or manufactured by, the refiner to produce blended gasoline and sell it under the refiners' federally protected trademarks.

71. Because the Tennessee Renewable Fuels Blending Act stands as an obstacle to the accomplishment of Congress's purposes and objectives, it is preempted by the Lanham Act.

Count III – Declaratory and Injunctive Relief:
Petroleum Marketing Practices Act Preemption of the Tennessee Renewable Fuels Blending Act

72. API incorporates and realleges each and every allegation contained in paragraphs 1 to 71 of this Complaint as though fully set forth herein.

73. The Tennessee Renewable Fuels Blending Act interferes with the PMPA's goals of uniformity and franchisor flexibility. The Tennessee law interferes with uniformity because it imposes requirements for franchise agreements that do not exist in other states, and it interferes with franchisor flexibility because it restricts a refiner's ability to terminate a franchisee for unauthorized blending.

74. The PMPA expressly preempts any state law that interferes with a refiner's ability to terminate or non-renew a franchisee. The Tennessee Renewable Fuels Blending Act interferes in this manner by limiting a refiner's ability to terminate or non-renew a franchisee based on a wholesaler's unauthorized blending. The PMPA expressly states that "willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations" is grounds for termination or non-renewal. 15 U.S.C. § 2802(c)(10). Unauthorized blending of biofuels into gasoline is grounds for termination or non-renewal under this provision. Because the Tennessee Renewable Fuels Blending Act prevents a

refiner from prohibiting blending, this restricts a refiner's ability to terminate or non-renew based on unauthorized blending.

75. Because the Tennessee Renewable Fuels Blending Act interferes with a refiner's ability to terminate or non-renew a franchise agreement, it is preempted by the PMPA.

Count IV – Declaratory and Injunctive Relief:
Commerce Clause

76. API incorporates and realleges each and every allegation contained in paragraphs 1 to 75 of this Complaint as though fully set forth herein.

77. Article I, section 8 of the United States Constitution provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." The Supreme Court has interpreted this provision to prevent states from discriminating against or burdening interstate commerce. A state law violates the Commerce Clause where, as here, it discriminates against interstate commerce or it imposes an excessive burden on interstate commerce relative to its local benefits.

78. The Tennessee Renewable Fuels Blending Act discriminates against interstate commerce by favoring wholesalers, who are almost overwhelmingly in-state companies, over refiners and suppliers, who are overwhelmingly out-of-state companies. By letting wholesalers decide whether they want to blend refiners' gasoline and claim the accompanying federal tax credit, the General Assembly has impermissibly chosen to favor the local, in-state wholesalers over the out-of-state refiners. The General Assembly had no justification beyond economic protectionism for favoring in-state wholesalers in this manner.

79. The Tennessee Renewable Fuels Blending Act also discriminates against interstate commerce by imposing a burden on interstate commerce that is clearly excessive in relation to any local benefits. The statute imposes a substantial burden on refiners and suppliers who are obligated by federal law to blend vast amounts of biofuels, but

who are required by the Tennessee Renewable Fuels Blending Act to sell unblended gasoline. There is no benefit—other than economic protectionism—for imposing such a burden.

80. For these reasons, the Tennessee Renewable Fuels Blending Act violates the Commerce Clause of the U.S. Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

a) Enter a judgment declaring that the Tennessee Renewable Fuels Blending Act, Tenn. Code Ann. § 47-25-2001 *et seq.*, is null and void and unenforceable because the Tennessee Renewable Fuels Blending Act is preempted by the Energy Policy Act of 2005 and Energy Independence and Security Act of 2007, and therefore is invalid under Article VI of the United States Constitution;

b) Enter a judgment declaring that the Tennessee Renewable Fuels Blending Act, Tenn. Code Ann. § 47-25-2001 *et seq.*, is null and void and unenforceable because the Tennessee Renewable Fuels Blending Act is preempted by the Lanham Act, and therefore is invalid under Article VI of the United States Constitution;

c) Enter a judgment declaring that the Tennessee Renewable Fuels Blending Act, Tenn. Code Ann. § 47-25-2001 *et seq.*, is null and void and unenforceable because the Tennessee Renewable Fuels Blending Act is preempted by the Petroleum Marketing Practices Act, and therefore is invalid under Article VI of the United States Constitution;

d) Enter a judgment declaring that the Tennessee Renewable Fuels Blending Act, Tenn. Code Ann. § 47-25-2001 *et seq.*, is null and void and unenforceable because the Tennessee Renewable Fuels Blending Act violates the Commerce Clause, Article I, section 8, of the United States Constitution;

e) Enter a permanent injunction, API's members having no adequate remedy at law and suffering irreparable injury as a result of the Tennessee Renewable Fuels Blending Act, enjoining Defendant, as well as any other person acting in the name of the State of Tennessee, or of the People of the State of Tennessee, from enforcing or taking any action to enforce the Tennessee Renewable Fuels Blending Act against API's members;

f) Should API so move, enter a preliminary injunction pending final resolution of this action, API's members having no adequate remedy at law and suffering irreparable injury as a result of this unconstitutional Tennessee statute, enjoining Defendant, as well as any other person acting in the name of the State of Tennessee, or of the People of the State of Tennessee, from enforcing or taking any action to enforce the Tennessee Renewable Fuels Blending Act against API's members, pending further order of this Court;

g) Grant API and/or API's members attorneys' fees pursuant to 42 U.S.C. § 1988; and

h) Grant API and/or API's members such other and further relief, including costs, as the Court deems just and proper.

Respectfully submitted,

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